Supreme Court, U.S.
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No. 01-1744

IN THE

SUPREME COURT OF THE UNITED STATES

COUNTY OF HUMBOLDT, *et al.*,

Petitioners,

v.

HEADWATERS FOREST DEFENSE, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I.

THE PROPER FOCUS OF THIS PETITION IS A USE OF FORCE *POLICY* DECISION.

Respondents' opposition brief focuses on the individual applications of OC by the officers in the field. Ignoring for the moment the inaccuracies in the respondents' descriptions of those applications – this focus is misdirected.

Plaintiffs did not appeal the district court's grant of summary judgment in favor of the officers who were at the scene of the events in question. These defendants include the officers who applied (or assisted in applying) the pepper spray, as well as the commanding officers at the scene. The only individual defendants remaining in this litigation are Humboldt County Sheriff Lewis and his Chief Deputy, defendant Philp. The only role these defendants had was the decision to authorize the use of pepper spray as an alternative to the use of the Makita grinding saw – a decision which was made in direct response to concerns expressed by officers in the field that the use of grinders to extricate protestors was becoming increasingly dangerous for both the officers and the arrestees.[1]

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[1] In fact, since the filing of petitioners' opening brief, these safety concerns were again validated, i.e., a Humboldt County special services deputy attempting to extricate a protestor wearing a black bear device inadvertently cut the protestor's arm. The protestor had "blockaded" himself inside a car driven onto a sidewalk and parked directly in front of the entrance to the Pacific Lumber Company office – the site of the first incident in the present litigation. The extrication process lasted six hours.

In view of the unchallenged granting of qualified immunity to the officers in the field, the proper focus of this case is now the decisions of policy makers with respect to the use of force in general.[2] This provides a unique opportunity for this Court to address the reasonableness of use of force *policy decisions* by law enforcement officials – decisions which the Ninth Circuit has determined are more appropriately given to jury determination. This distinguishes *Headwaters* from both *Saucier v. Katz,* 533 U.S. 194 (2001) (addressing qualified immunity for officer making a single arrest) and *Hope v. Pelzer,* 122 S.Ct. 2508 (2002) (granting certiorari on question of whether three prison guards were entitled to qualified immunity for use of a "restraining bar" on the inmate-plaintiff).

The distinction is critical, in that the decision to authorize the use of a pepper spray option was based on extensive research and consultation by the policymaker-defendants, including review of a Department of Justice report finding no injuries from the use of pepper spray, discussions with county counsel and a district attorney, and a review of applicable case-law. Contrary to the reasoning of the Ninth Circuit panel, the objective reasonableness of this decision does not hinge on factual disputes – but is a pure question of law, which should be decided by a court, and not a jury.

In addition, as in the courts below, plaintiffs continue to exaggerate and misrepresent both the application of

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[2]The County of Humboldt remains in the case because the defendant officials were County policy makers. The City of Eureka remains in the litigation because the use of pepper spray at Congressman Riggs' office in Eureka was authorized by Eureka Police Captain Honsal as within department policy.

OC and its effects on the plaintiffs. There was not one iota of medical evidence presented at trial or anywhere else to substantiate the claim that any plaintiff suffered an injury of any kind from the use of OC. Petitioners' appendix ("App."), 57a-58a (no evidence of "risk of physical injury or actual physical injury resulting from the use of OC" at any of the incidents). Nor was any evidence presented at trial (other than the unsubstantiated trial testimony of one of the plaintiffs) supporting the claim that OC was applied directly to the eyeball of any plaintiff – as claimed in respondent's brief. Rather, the undisputed evidence – including the videotaped footage documenting each and every application – was that all plaintiffs had their eyes tightly *shut* during application. *Id.* In contrast to the descriptions of "torture," "debilitating pain," and "prolonged emotional and psychological injuries" presented by respondents, Judge Walker, the presiding district court judge, summarized the extent of the use of force as follows:

> . . . The severity of the intrusion upon the arrestees' personal integrity was minimal. The officers did not threaten or use deadly force or even employ a significant level of physical force. Rather, the force used was merely the infliction of transient pain without significant risk of physical injury. In fact, plaintiffs failed to introduce any evidence that the use of cotton swabs to apply OC posed *any* risk of injury. App., 60a-61a (emphasis added).

Plaintiffs' portrayal of the events at issue is also in sharp contrast to the videotaped interview of plaintiff Lundberg, taken shortly after the application of OC. As seen in the videotape (see Videotape II lodged with the court on April 30, 2001) there are no indications that Ms. Lundberg was suffering any ill-effects whatsoever from the use of OC.

II.
THE NINTH CIRCUIT IGNORED THIS COURT'S REMAND ORDER AND *SAUCIER v. KATZ.*

Plaintiffs assert that ". . . the sole issue here is still whether the demonstrators have presented evidence sufficient to preclude entry of a Rule 50 judgment as a matter of law on both the County defendants' affirmative defense of qualified immunity and on the demonstrators' own Fourth Amendment claims, and to permit the demonstrators to finally have this case resolved by a jury."

Defendants agree that the Ninth Circuit has again sidestepped both the underlying constitutional question as well as the first prong of the qualified immunity analysis on the basis of supposed disputes in "historical facts." However – as discussed in petitioners' opening brief, the Ninth Circuit's decision should be reviewed because, in avoiding the issue, the panel ignores this Court's instructions in *Saucier* concerning the role of the court as both a gatekeeper and promulgator of constitutional standards. See Opening Brief in Support of Petition, pp. 12-15. The Court's role is especially critical in the case of policy decisions by high-ranking local government officials – as is the case here.

Just as this Court granted review of the Ninth Circuit's decisions underlying *Hunter v. Bryant*, 502 U.S. 225 (1991) (reversing Ninth Circuit's refusal to grant qualified immunity to officers making arrest for threatening the President) and *Saucier v. Katz, supra* (reversing Ninth Circuit's refusal to grant qualified immunity to officers on claim of excessive force), review is once again required in *Headwaters* to correct the Ninth Circuit's refusal to acknowledge the standards established by this Court which apply to both excessive force claims and qualified immunity.

III.
THIS COURT'S RECENT DECISION IN *HOPE v. PELZER* DOES NOT RESOLVE THE ISSUES PRESENTED BY THIS PETITION.

Plaintiffs assert that the second issue presented – the application of the "clearly established law" requirement – is now moot, in view of the Court's recent decision in *Hope v. Pelzer*, 122 S.Ct. 2508 (2002). Plaintiffs are mistaken.

As the Court is aware, the issue addressed in *Hope v. Pelzer* was whether three prison guards violated clearly established law for purposes of qualified immunity when they ordered the plaintiff-inmate to be attached to a "hitching post" for the sole purpose of inflicting punishment. Consistent with the two-step analysis set forth in *Saucier*, the Court determined that the use of the device under the circumstances alleged violated the Eighth Amendment. In doing so, the Court determined that the state of the law at the time of the incidents gave "fair warning" to the defendants that the use of the hitching post "violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Hope*, 122 S.Ct. at 2515.

While the Court pointed out that the "clearly established" standard does not require previous case law derived from "fundamentally similar" facts, the court based its denial of qualified immunity on "binding Eleventh Circuit precedent, an Alabama Department of Corrections (ADOC) regulation, and a DOJ report informing the ADOC of the constitutional infirmity in its use of the hitching post. . ." *Id.* The dissent agreed with the majority's statement that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *What is significant for pur-*

poses of the present discussion is that both the majority and the dissenting Justice agreed that a defendant is entitled to a "fair warning" that the conduct at issue violates constitutional or statutory law. Accordingly, both the majority and dissenting opinions discuss applicable case law and regulations to determine whether the law was clearly established at the time of the incidents in question.

In *Headwaters II,* the Ninth Circuit panel parts company with *Hope, Saucier,* and every other court in the land by completely ignoring the "fair warning" requirement and bases denial of qualified immunity on post-incident decisional law, i.e., *LaLonde v. County of Riverside,* 204 F.3d 947 (9th Cir. 2000) – a factually dissimilar case decided three years after the incidents in question that has nothing to do with policy level decisions by local government officials. Granting certiorari in this case is warranted to instruct the Ninth Circuit that "fair warning" for purposes of qualified immunity does not encompass factually dissimilar or post-incident case law, and does not permit the complete disregard of pre-incident decisional law favorable to the defendants, which, in this case, was the Ninth Circuit's decision in *Forrester v. City of San Diego,* 25 F.3d 804 (9th Cir. 1994) (determining that the use of injury-producing martial arts devices to effect the lawful arrest of genuinely passive abortion protestors was reasonable under fourth amendment standards).

Plaintiffs attempt to explain-away the Ninth Circuit's remarkable departure from both settled law and common sense on the last two pages of their brief. In tortured logic, plaintiffs essentially argue that the post-incident *LaLonde* decision gave "fair warning" to the defendants because it happened to cite a pre-incident decision, *Men-*

doza v. Block, 27 F.3d 1357 (9th Cir. 1994). Even accepting as valid the argument that a pre-incident-decision-within-a-post incident decision can provide notice and a basis for denial of qualified immunity, the plaintiffs' position becomes completely untenable upon the realization that the facts and circumstances of *Mendoza v. Block* were not even remotely similar to those confronting the defendants in *Headwaters*. The court in *Mendoza* determined that the use of a police dog to locate and secure a bank robbery suspect was objectively reasonable under the circumstances. How this could have provided fair warning to the defendants in this case that the use of OC under the circumstances was unconstitutional defies any rational inquiry.

CONCLUSION

It can fairly be said that *Headwaters II* represents a mockery of the qualified immunity standards reiterated and further developed by this Court in both *Saucier* and *Hope v. Pelzer*, a disregard for this Court's remand order, and another Ninth Circuit decision in the tradition of the opinions reviewed by this Court in *Hunter v. Bryant* and *Saucier*, i.e., a refusal to afford immunity from suit to "all but the plainly incompetent or those who knowingly violate the law." Indeed, *Headwaters II* represents a much more radical departure from the teachings of this Court. The opinion completely eliminates any notion of fair warning in the qualified immunity standard, and instructs that researched use of force *policy* decisions of government officials are properly given to jury determination.

Viewed from a broader perspective, the effect of *Headwaters II* is to instruct law enforcement officers dealing with increasingly resistant activists to either

abandon alternatives such as pepper spray and revert to hands-on techniques known to produce injury, or disregard their sworn duty to enforce the law – and simply walk away. Here, to brush aside as harmless the well-planned criminal activities of plaintiffs is to compromise allegience to principles which permit the very existence of a society which is both democratic and ordered. As aptly stated by Justice Kennedy in *Bray v. Alexandria Woman's Health Clinic,* 406 U.S. 263, 287 (1993):

> The wholesale commission of common state-law crimes creates dangers that are far from ordinary. Even in the context of political protest, organized, premeditated lawlessness menaces in a unique way the capacity of the State to maintain order and preserve the rights of citizens.

For these reasons, and for the reasons set forth in Petitioners' Openng Brief, Petitioners urge this Court to grant a writ of certiorari in this case.

Respectfully submitted,

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